U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 22 August 2003

BALCA Case Nos.: 2002-INA-239
2002-INA-240

ETA Case Nos.: **P2001-MA-01306853**
P2001-MA-01306865

In the Matters of:

MALINOWSKI AND SONS,
Employer,

on behalf of

JOHN O. DALEY and HUGENT MORRIS,
Aliens

Appearance: Janet Cohan
Attorney for Employer

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Malinowski and Sons (Employer), filed two applications for labor certification[1] on

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182 (a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the records upon which the CO denied certification and Employers' request for review, as contained in the respective appeal files and any written arguments. 20 C.F.R. §656.27(c).

behalf of (Aliens) John O. Daley and Morris Hugent in the Spring of 1999.[2] Employer sought to employ both Aliens for the same position, "Farm Manager." (AF 1) Two years experience in the job offered or a related field was required. (AF 1) In March of 2002, the Certifying Officer (CO) denied certification for both applications. The issue on appeal in both cases is whether Employer adequately complied with the CO's request for information explaining why the position for which certification is being sought requires a permanent worker when temporary workers were used previously. (AF 29) Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. §18.11.

STATEMENT OF THE CASE

On April 8, 1999, Employer filed an application for labor certification on behalf of both Aliens for the positions of Farm Manager. (AF 1) The job duties for the positions are "[f]arm management, crop rotation, fertilization specialties." (AF 1) The requirements for the positions are two years of experience in the jobs offered or a related occupation.

On December 5, 2001, the CO issued a Notice of Findings (NOF) indicating his intent to deny both applications on the grounds that it did not appear that 1) *bona fide* job opportunities existed; and, 2) the requirements for the job opportunities were the actual minimum requirements for the job opportunities. Specifically, the CO first noted that Employer had previously been using the H-2A program, which required temporary workers for a number of years and "all of a sudden" now needed permanent workers. (AF 25) Additionally, the CO directed Employer to submit evidence to show that Employer's requirement of two years' experience in the job was Employer's actual requirement and not simply a preference to restrict the position to the Aliens. The CO noted that, while Employer required U.S. workers to have two years experience in the job offered, a review of the respective

[2] In this decision "AF" refers specifically to John O. Daley Appeal File as representative of the Appeal File of both appeals. A virtually identical application was filed for all both Aliens and the issues raised and dealt with by the CO (*i.e.*, NOF, FD, etc.,) in each case are identical.

ETA-750 Part B (Statement of Qualifications of Aliens) reflects experience gained as self-employed farmers in Jamaica, but there is no proof that such experience was actually gained by the Aliens. (AF 25) Employer was directed to submit further documentation attesting to the qualifications of both Aliens.

In its Rebuttal dated January 9, 2002, Employer stated that due to a growth in Employer's business, the H-2A program was no longer sufficient to meet its needs. (AF 27) Additionally, Employer stated that it was now growing onions, which require year round supervision of packing and transporting. The Employer submitted nothing in response to the CO's request for documentation supporting the Aliens' experience. Instead, Employer stated that it had orally ascertained Aliens' experience in the job offered while interviewing them.

In May, 2002, the CO issued Final Determinations (FD) denying certification. (AF 28-29) The CO noted that Employer was advised to provide documentation to explain 1) why the positions to which certification is sought require workers on a permanent basis; and 2) what Aliens' duties would have been during the winter months that would require full time employment. Additionally, Employer was requested to provide documentation to show that the Aliens possessed prior job experience now being required of U.S. applicants. The CO found that Employer's Rebuttal did not satisfy 20.C.F.R. §656.50 and 656.20(c)(8) because Employer failed to provide documentation supporting Employer's need for permanent workers or documentation attesting to Aliens' prior experience.

Employer submitted a request for Review in June 2002, and filed a brief on August 2, 2002. Employer contends on appeal that because it has recently begun onion farming, which requires year round supervision requiring full time workers.

DISCUSSION

In this case, the CO has found that no *bona fide* job opportunity exists because Employer failed to adequately document its need for permanent workers and the prior job experience of the Aliens. (AF 29) The requirement of a *bona fide* job opportunity arises out of section 656.20(c)(8), which requires an employer to attest that the "job opportunity has been and is clearly open to any qualified U.S. worker." The employer bears the burden of proving that a position is permanent and full-time. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). If a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). A job opportunity's requirements may be found not to be the actual minimum requirements where the alien did not possess the necessary experience prior to being hired by the employer. *Super Seal Manufacturing Co.*, 1988-INA-417 (Apr. 12, 1989) (*en banc*).

We agree with the CO that Employer has not adequately documented either that the change in the nature of its business justified conversion of the jobs offered from seasonal to permanent, or that the Aliens had the experience before their hire that is now being required of U.S. applicants. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659, (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Here, Employer's in its very brief, unsupported rebuttal letters merely asserts that it has converted to onion production, which requires additional winter time supervision of packaging and transporting of goods,[3] and that it verified the Aliens' qualifications orally essentially by asking the Aliens about their qualifications prior to hire. On appeal, Employer's attorney provided a bit more detail about the onion crop in the appellate brief. But this additional detail is still sketchy; moreover, there is no indication that the attorney had first-

[3] The CO's final determination includes some discussion about whether carpentry and masonry skills could be used to justify the conversion to full-time, permanent employment; however, the appeal file before the Board contains no mention of carpentry or masonry skills.

hand knowledge and therefore was competent to testimony in this regard. Finally, the details found in the attorney's appellate brief were a not part of the rebuttal documentation and therefore cannot be considered by the Board. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); 20 C.F.R. §§ 656.26(b)(4) and 656.27(c).

ORDER

The Certifying Officer's denial of certification in the above-captioned cases is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.